

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-7299

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To be argued by
FREDERICK D. BERXON

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

MISS MAE M. SMITH
a/k/a Miss Mary M. Smith.

Plaintiff-Appellant,

—against—

FRED BARONS, FBI Agent;
OSCAR RUBIN, Esq., Lawyer, et al.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK,
HONORABLE MARK A. COSTANTINO, DISTRICT JUDGE

BRIEF FOR DEFENDANT-APPELLEE
RETAILERS COMMERCIAL AGENCY, INC.

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a/k/a Miss Mary M. Smith,

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et al.,

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK, HONORABLE MARK A. COSTANTINO,
DISTRICT JUDGE

BRIEF FOR DEFENDANT-APPELLEE
RETAILERS COMMERCIAL AGENCY, INC.

STATEMENT OF THE ISSUES

Plaintiff-appellant appeals from an order of the Honorable Mark A. Costantino dated June 1, 1976 and the judgment entered thereon June 2, 1976 in the Eastern District of New York, granting the government's motion for summary judgment and the motions of all the other moving defendants, including defendant-appellee Retailers Commercial Agency, Inc.

("Retailers"), dismissing the amended complaint, with prejudice, for violation of Rule 8(e)(1) of the Federal Rules of Civil Procedure. This brief is submitted on behalf of Retailers in support of affirmance of the order of dismissal granted by the District Court.

The only relevant issue presented for review on this appeal is as follows: Was the District Court correct in dismissing, with prejudice, plaintiff-appellant's amended complaint?

STATEMENT OF THE CASE

Plaintiff-appellant commenced this action on or about December 8, 1975 by filing a complaint which named many parties in the caption as defendants and witnesses, including Retailers. (R 1, 3)* Apart from the listing in the caption, there was no reference whatever to Retailers throughout the remainder of the complaint. Though the complaint appeared to speak in terms of conspiracy since 1946 to deprive plaintiff of civil rights through purported acts of slander, it was impossible to make any legally meaningful characterization of the complaint, given its vague, disjointed and confusing presentation. On the motion of defendants, including Retailers, the District Court dismissed the original complaint on March 4, 1976 with leave to file an amended pleading within sixty days.

(R 36)

* References are to the Record on Appeal.

Plaintiff served an amended complaint on or about April 22, 1976. Again, the amended complaint covered a period ranging over thirty years, and in the same vague and confusing manner as the first complaint, pleaded a disjointed narration concerning thirty-nine named defendants and witnesses, including government officials, lawyers, members of her family, past employers and persons associated with those employers. (R 46)

Defendants again moved for dismissal. Though plaintiff did not submit formal opposing papers, a hearing was held on May 26, 1976 in which plaintiff orally presented her opposition. In an order dated June 1, 1976, Judge Costantino granted the government's motion for summary judgment and dismissed the amended complaint with prejudice as to the remaining defendants on the ground that it violated Rule 8(e)(1). (R 67) Judgment was entered June 2, 1976. (R 68) In response to a letter from plaintiff, Judge Costantino, in an order dated June 16, 1976, made minor modifications in the wording of his June 1, 1976 order. (R 69, 70)

In the amended complaint, which is over thirty pages in length, there is only a single reference to Retailers.*

* Indeed, given the absence of any allegations against Retailers in the first complaint and the nature of the reference to Retailers in the second, it is unclear whether Retailers is named as a defendant or witness. For purposes of this appeal however, Retailers responds as a defendant-appellee.

On page thirty the following statement appears:

"In June, 1965 these [Retailers] contacted the PLAINTIFF by mail and asked the PLAINTIFF to call them. When the PLAINTIFF did call them the woman who had written to the PLAINTIFF desired personal information from HER! When the Plaintiff asked this woman WHO paid THEM to check on the PLAINTIFF this woman said that their client did NOT wish to be known! THEIR letter to the PLAINTIFF was a form-letter LIE to the PLAINTIFF! We desire updating your credit references. THEY ARE EXCELLENT! NO NEED! Immediately the Plaintiff contacted the Better Business Bureau and the CHIEF of Detectives at the nearest Police Precinct to Retailers. AFTER the POLICE investigated a detective called the Plaintiff and said that Retailers told the POLICE that the PLAINTIFF had try to BUY thousands of stocks and bonds from a COMPANY with OFFICES in New Jersey and CONN. PERJURY BY RETAILERS! INVASION OF PRIVACY FOR A GHOST CLIENT! NAME YOUR CLIENT RETAILERS!"

These allegations respecting Retailers bear no connection whatever to the multitude of matters pleaded against all the other named defendants and witnesses. It is difficult to fathom from these allegations what, if anything, the claim is against Retailers or how it fits in this lawsuit.* There is no further elaboration in the brief of plaintiff-appellant on this appeal, for in its thirty-one pages, there is only one reference to Retailers contained in the statement of the issues. (Br. p. 4)

* In written correspondence to the Court and to Retailers, dated February 27, 1976, plaintiff stated:

"RETAILERS: The PLAINTIFF asks ONLY FROM YOU that YOU tell the US District Court the NAME of the COMPANY which had YOU investigate the PLAINTIFF in June, 1965. NO MORE THAN THAT FROM YOU! Do NOT tell us that RETAILERS must keep this information confidential when that is the very last thing that RETAILERS does for anyone, and many LIVES nationally have been DESTROYED by your company's INADEQUATE investigations for ABOUT 20 years!"

STATEMENT OF RELEVANT FACTS

Beyond the procedural history of this matter and the nature of the claim, there are no relevant facts which can be discussed. In the affidavit of Retailers, which was submitted in support of the motion to dismiss the amended complaint, it was stated that:

"I [the attorney for Retailers] am informed by Retailers that it has no file pertaining to plaintiff. Its records show no indication of any contact with or report on plaintiff nor is there any record of any inquiry by the police at Retailers' office." (R 49)

However, for purposes of this appeal (as it was in the court below for purposes of the motion to dismiss), facts as such, are not in issue. It is only the sufficiency of the complaint which must be determined.

SUMMARY OF ARGUMENT

Given the presentation and nature of the allegations of the amended complaint concerning Retailers, there is no question that the order and judgment dismissing the action should be affirmed. Point I of this brief will demonstrate that Judge Costantino was correct in dismissing the amended complaint with prejudice on the ground that it violated Rule 8(e)(1). Point II of this brief will demonstrate that even beyond Rule 8(e)(1), dismissal was warranted and should be affirmed in that (a) there is no subject matter jurisdiction, (b) the amended complaint

fails to state a claim upon which relief can be granted and
(c) any claim against Retailers is barred by virtue of the
statute of limitations.

POINT I

DISMISSAL SHOULD BE AFFIRMED
ON THE GROUND THAT THE AMENDED
COMPLAINT VIOLATES RULE 8(e)(1).

In his order dated June 1, 1976, Judge Costantino
dismissed the amended complaint with prejudice on the ground
that it violated Rule 8(e)(1) of the Federal Rules of Civil
Procedure, which provides:

"(e) PLEADING TO BE CONCISE AND DIRECT;
CONSISTENCY

(1) Each averment of a pleading
shall be simple, concise and
direct. No technical forms of
pleading or motions are required."

Plaintiff-appellant's amended complaint is a redundant
and confusing document, replete with disconnected, incoherent
and rambling statements which make it impossible for any of
the parties or the court to understand the claim. This com-
plaint is no improvement whatever on plaintiff-appellant's
original complaint. In view of the fact that plaintiff-
appellant had a full opportunity to comply with Rule 8(e)(1)
after the first court order of March 4, 1976, dismissal of
the amended complaint with prejudice was warranted and
proper. See, Koll v. Wayzata State Bank, 397 F.2d 124, 125
(8th Cir. 1968); Vance v. American Soc. of Composers, Authors
& Publishers, 14 F.R.D. 30 (S.D.N.Y. 1953).

Moreover, the fact that plaintiff-appellant is pro se has no bearing on the issue of compliance with Rule 8(e)(1). In Boruski v. Stewart, 381 F. Supp. 529 (S.D.N.Y. 1974) a pro se amended complaint, alleging a conspiracy among air force officials, federal personnel, federal judges and federal attorneys to deprive plaintiff of due process and equal protection, was dismissed for violation of Rule 8(e)(1).

"Rule 8(e)(1), Fed.R.Civ.P. requires a 'simple, concise, and direct pleading. A prolix, confusing, redundant, protracted pleading such as the 125 page document herein is subject to dismissal under this Rule on that ground alone. Prezzi v. Berzak, 57 F.R.D. 149 (S.D.N.Y. 1972); Burton v. Peartree, 326 F. Supp. 755, 759 (E.D. Pa. 1971). Even an understanding tolerance for pro se complaints, see Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), cannot save the present amended complaint from being stamped as flagrantly in violation of the Rule." 381 F.Supp. at 533.

A review of the amended complaint quickly reveals that no constructive purpose would be served by permitting litigation to proceed in this matter. Thus, on the basis of Rule 8(e)(1) alone, the order and judgment of dismissal should be affirmed.

POINT II

DISMISSAL SHOULD ALSO BE
AFFIRMED ON OTHER GROUNDS

Even beyond Rule 8(e)(1) dismissal of the amended complaint is warranted on the grounds that (a) there is no subject matter jurisdiction, (b) there is a failure to state a claim with respect to Retailers and (c) any claim against Retailers is barred by the statute of limitations.

A. There is a lack of jurisdiction over
subject matter.

Since the allegations in the amended complaint pertaining to Retailers sound, if anything, in tort under state law, there is no subject matter jurisdiction under any provision of federal law. Plaintiff-appellant's references in her complaint to certain federal laws and the United States Constitution are patently insufficient to invoke subject matter jurisdiction of the federal court.

First, jurisdiction cannot be predicated upon 28 U.S.C. §1332 since diversity of citizenship is lacking. Plaintiff-appellant appears to be a resident of New York and other defendants-appellees, including Retailers, are also citizens of New York.

Second, subject matter jurisdiction cannot be predicated upon 28 U.S.C. §1331. In order to come within the scope of this section, a federal question must be presented

and such question must be substantial and form an integral part of the complaint - none of which is accomplished in the amended complaint. Screven County v. Brier Creek Hunting & Fishing Club, 202 F.2d 369 (5th Cir.), cert. denied, 345 U.S. 994 (1953). No violation of any federal law is alleged in the amended complaint and since Retailers is a private corporation and not a state or federal agency, no jurisdictional basis exists as to it under the United States Constitution. See, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (Fourth Amendment); Gresham v. City of Chicago, 405 F. Supp. 410 (N.D. Ill. 1975) (Fourteenth Amendment). In any event, the claims of plaintiff-appellant, if anything, sound in tort under state law.

Third, subject matter jurisdiction cannot be predicated on any of the Civil Rights Acts as codified in 28 U.S.C. §1343 and 42 U.S.C. §§1983, 1985(3). Section 1983 requires an affirmative pleading that defendants acted under color of a state statute. Adickes v. S.H. Kress & Co., 358 U.S. 144 (1970); Jobson v. Henne, 355 F.2d 129, 133 (2d Cir. 1966). Section 1985(3) requires that conspiratorial, class oriented and invidious discrimination be alleged. Griffin v. Breckenridge, 403 U.S. 88 (1971); Crabtree v. Brennan, 466 F.2d 480 (6th Cir. 1972). Because all of these elements are absent here, these statutes cannot be utilized to convert plaintiff-appellant's grievances into federal civil rights claims. Place v. Shepherd, 446 F.2d 1239 (6th Cir. 1971); Spampinato

v. M. Breger & Co., Inc., 270 F.2d 46, 49 (2d Cir. 1959),
cert. denied, 361 U.S. 944 (1960).

Finally, subject matter jurisdiction cannot be predicated upon the Federal Torts Claims Act. See generally 28 U.S.C. 1346(b), 2671-80. Although officials of United States government agencies are named as defendants or witnesses in this action, an independent ground for jurisdiction over private persons joined herein must nevertheless be established. Benbow v. Wolf, 217 F.2d 203 (9th Cir. 1954); Guthrie v. United States, 238 F.Supp. 855 (E.D. Wis. 1965); Bullock v. United States, 72 F. Supp. 445 (D.N.J. 1947). As demonstrated above, there is no independent basis for federal jurisdiction in this action as against Retailers.

Even if federal subject jurisdiction could be found with respect to any of the other defendants in this action, an exercise of pendent jurisdiction over any purported state claim against Retailers would be inappropriate and unwarranted. Pendent jurisdiction is applicable only where the federal and state claims derive from "a common nucleus of operative fact". United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). There is no "common nucleus" here since the matters pleaded with respect to Retailers are entirely unrelated and distinct from the matters pleaded against any of the other defendants in the amended complaint.

Thus, in view of the fact that subject matter jurisdiction is lacking, the order and judgment of dismissal should be affirmed.

B. The amended complaint fails to state a claim upon which relief can be granted.

Assuming, arguendo, the truth of all of the matters pertaining to Retailers, the acts and statements alleged in the amended complaint do not state any claim for relief based on invasion of privacy or slander.

Under the law of New York, there is no common law right of privacy; the right of privacy exists only to the extent that it has been granted by Sections 50 and 51 of the New York Civil Rights Law. Levey v. Warner Bros. Pictures Inc., 57 F.Supp. 40, 42 (S.D.N.Y. 1944); Gautier v. Pro-Football, Inc., 304 N.Y. 354, 358 (1952); Roberson v. The Rochester Folding Box Co., 171 N.Y. 538 (1902).

The allegations with respect to Retailers in the amended complaint do not state a claim for an invasion of privacy under these sections or under the provisions of any other state or federal law.

Similarly, under New York law, no claim for relief against Retailers is stated for slander. The statements purportedly attributed to Retailers do not amount to actionable slander. On the contrary, all of the alleged acts pertaining to Retailers are in themselves harmless and incapable of causing injury.

In view of the fact that the amended complaint fails to state a claim, the order and judgment of dismissal should be affirmed.

C. Any claim against Retailers is barred
by the statute of limitations.

In all events, assuming the existence of subject matter jurisdiction and a stated claim for relief against Retailers, any such claim is clearly time barred.

An action for defamation or a violation of the right of privacy must be commenced within one year from the date the alleged claim accrued. N.Y. CPLR §215(3). It is clearly stated in the amended complaint, as well as in plaintiff-appellant's brief on this appeal (Br. p. 4), that the matters alleged against defendant-appellee Retailers occurred in June, 1965. Since the action against Retailers was commenced over ten years later, on or about December 8, 1975, any purported claim against Retailers for invasion of privacy or defamation is barred by the statute of limitations. The order and judgment of dismissal below should be affirmed.

CONCLUSION

For the reasons stated in Points I and II herein,
the order and judgment of the District Court dismissing the
amended complaint with prejudice should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

State of New York,
City of New York,
County of New York, ss.:

ALFRED BUSH, JR., being duly sworn, deposes and says that he is over 18 years of age. That on the 5th day of October, 1976, he served 2 copies of the within brief on Behalf of Defendant-Appellee Retailers Commercial Agency, Inc., upon:

MISS MAE M. SMITH
c/o Coleman Family
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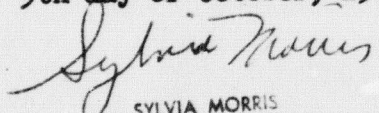
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By depositing 2 copies of the same securely enclosed in a post-paid wrapper in a branch depository maintained and exclusively controlled by the United States Post Office at Greenwich and Vestry Streets, addressed to the above named people, that being the address within the State designated by them for that purpose upon the preceding papers as the place where they regularly kept an office, and at which place they regularly received mail.

Sworn to before me this

5th day of October, 1976


SYLVIA MORRIS
Notary Public, State of New York
No. 31-4526651
Qualified in New York County
Commission Expires March 30, 1978


ALFRED BUSH, JR.

AFFIDAVIT OF SERVICE BY MAIL

State of New York,
City of New York,
County of New York, ss.;

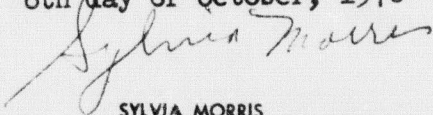
ALFRED BUSH, JR., being duly sworn, deposes and says that he is over 18 years of age. That on the 6th day of October, 1976, he served 2 copies of the within brief on behalf of Defendant-Appellee Retailers Commercial Agency, Inc., upon

MURPHY & BURK
8 West 40th Street
New York, New York 10018

By depositing 2 copies of the same securely enclosed in a post-paid wrapper in a branch depository maintained and exclusively controlled by the United States Post Office at Greenwich and Vestry Streets, addressed to the above named people, that being the address within the State designated by them for that purpose upon the preceding papers as the place where they regularly kept and office, and at which place they regularly received mail.

Sworn to before me this

6th day of October, 1976



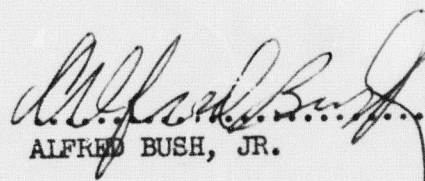
SYLVIA MORRIS

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ALFRED BUSH, JR.

Service of 2 copies of this within

Brief is admitted this
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